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No. 96-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RABBI ABRAHAM GROSSBAUM
and LUBAVITCH OF INDIANA, INC.,

Petitioners,

v.

INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY
and RONALD L. REINKING,
in his Capacity as General Manager,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

When a government body bans all private displays in a nonpublic forum, and the ban is even-handedly enforced, is the motive for enacting the ban relevant?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is under review.

The Indianapolis-Marion County Building Authority is a municipal corporation existing under the laws of the State of Indiana and has no stockholders, parent companies or subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 100 F.3d 1287. The opinion of the district court is reported at 909 F.Supp. 1187. Earlier opinions of the Seventh Circuit and district court in this case, although not directly related to the question presented to this Court for review, are reported at 63 F.3d 581 and 870 F.Supp. 1450, respectively.

JURISDICTION

The opinion of the Seventh Circuit was decided November 20, 1996. The petitioners obtained an extension of time to file a petition for writ of certiorari to March 18, 1997. The jurisdiction of this Court is based on 28 U.S.C. § 1254.

RULES INVOLVED IN THE CASE

On October 2, 1995 the Board of Directors of the Indianapolis-Marion County Building Authority ("Building Authority") unanimously amended and restated Rules 13 and 14 of the Rules and Regulations Governing the City-County Building to read:

> **USE OF COMMON AREAS.** Use of the common areas of the City-County Building including lobbies, corridors, the Public Assembly Room, Observatory, and other meeting rooms (generally those public areas not leased to governmental tenants) is restricted to the Building Authority and its governmental tenants. No displays, signs or other structures shall be erected in the common areas by any non-governmental, private group or individual since such objects may interfere with unobstructed and safe ingress and egress by

> employees of the governmental tenants and by the general public conducting business with government offices and courts in the City-County Building.
>
> **USE OF COMMON AREAS FOR POLITICAL ACTIVITIES.** Use of the common areas of the City-County Building (generally those public areas not leased to governmental tenants) for political activities is prohibited. No political signs, pictures or other materials shall be posted or displayed in the common areas.

Similarly, on November 2, 1995 the Board of Directors unanimously amended Rule 9 to read:

> **SOLICITING, VENDING AND DEBT COLLECTION.** Soliciting gifts or contributions of any kind, commercial soliciting and unapproved vending of all kinds, display or distribution of commercial advertising, or collecting private debts in or about the Building is prohibited.

STATEMENT OF THE CASE

A. An Introduction to the Chronology of Events.

The Building Authority is a municipal corporation responsible for managing the City-County Building, which is located in downtown Indianapolis. The City-County Building is a public facility which houses the seats of government for both Marion County and the City of Indianapolis. The City-County Building is the focal point of city and county government and includes for example, the offices of the

Assessor, Auditor, Clerk, Mayor, Prosecutor, Recorder, Sheriff, Treasurer, and dozens of criminal, civil and juvenile courts. In total, sixty-eight (68) governmental tenants occupy the building.

Historically, the requests approved by the Building Authority to use the lobby of the City-County Building fell into three categories: (1) private use; (2) governmental tenant endorsement of a private use; and (3) use by a governmental tenant for a government purpose. Among these displays was Rabbi Grossbaum's menorah which was placed in the lobby each year during Chanukah from 1985 to 1992.

Over the past decade, the Building Authority has become increasingly aware of and concerned over the security of the building and the ability of visitors and tenant employees to safely and efficiently enter and leave the building. During the late 1980's and early 1990's, a rise in the number of security related incidents increased the need for developing a means by which to adequately secure the building. Certain tenants' requests for increased security necessarily focused the Building Authority's attention on the use of the lobby and the traffic flow therein.

When, in 1992, the Indiana Civil Liberties Union ("ICLU") suggested to the Building Authority that it "open the lobby" and create a public forum to allow unlimited private discourse, the Building Authority responded by considering the regulations concerning the use of the lobby. Specifically rejecting the notion of a public forum as suggested by the ICLU, but in an effort to address the constitutional concerns raised by both the ICLU and the Jewish Community Relations Council ("JCRC"), the Building Authority, in October of 1993, took what it believed was an appropriate step in achieving those ends. It enacted a new display policy, a constitutional middle-ground, in which the Board attempted to accommodate

the needs of the tenants and their tenant sponsored activities, while at the same time addressing the Establishment Clause issues raised by the ICLU and the JCRC.

Based on this 1993 policy, the Building Authority denied Rabbi Grossbaum's request to display a menorah in the lobby of the City-County Building in 1993 and 1994. It was the 1993 policy that the Seventh Circuit found facially unconstitutional in August of 1995. *See Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581 (7th Cir. 1995).

Beginning in 1993, well prior to the initiation of any litigation between the parties, and continuing during the pendency of the first appeal concerning the facial constitutionality of the 1993 policy, the General Manager of the Building Authority discussed with counsel the need for a comprehensive policy or set of policies to address the security changes and access concerns. The conclusion reached in the spring of 1995 was to recommend that the Board close the forum completely regardless of the outcome of the then pending appeal relating to the facial constitutionality of the 1993 policy. On the advice of counsel, however, the Building Authority did not take any action on amending its regulations until the Seventh Circuit ruled on the appeal relating to the 1993 policy, in order to avoid the impression that the Building Authority was trying to circumvent an order from the Seventh Circuit enjoining the enforcement of the 1993 policy during the appeal.

In addition, in June of 1995, after years of debating the relative merits of several different proposals (among the Building Authority, the Judges, the Mayor and other City and County tenants) for increasing security at the City-County Building, the City-County Council appropriated the necessary funds for the first of what is likely to be several steps towards

totally securing the building. The Building Authority knew that the measures for which monies were appropriated in June of 1995 would significantly increase congestion in the already congested lobby. The Building Authority also knew that further security measures likely to be adopted in the future would only make the situation worse.

On August 15, 1995, the Seventh Circuit held that the 1993 policy was facially unconstitutional because it prohibited only those seasonal displays which expressed a religious perspective while allowing seasonal displays which were secular in nature. *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581 (7th Cir. 1995). On October 2, 1995 and November 5, 1995, the Board adopted amendments and restatements to three (3) of the Building Authority's Rules and Regulations to close the forum and prohibit all private uses of the lobby of the City-County Building. The enactment of this total ban in October and November of 1995 is what now brings the parties before this Court.

B. The Historical Problem of Congestion in the City-County Building.

The City-County Building is an active place which, since at least 1985, has been "under-elevatored". In 1985 the Building Authority hired a consultant to evaluate the elevator problem. The findings of the study confirmed the Building Authority's observations; the elevators cannot handle the traffic of the building. The effect of the under-elevatored problem is that large groups of people are frequently waiting in and around the first floor elevator area (adjacent to the lobby) to get an elevator. Congestion in the first floor lobby area is and always has been a concern of the Building Authority and its tenants.

C. The Concern Over Security in the City-County Building.

The City-County Building is also a relatively dangerous place. For example, during the one year period from January 4, 1993 to January 4, 1994 a total of 6,578 knives and 191 guns were confiscated adjacent to a single courtroom in the City-County Building. That particular courtroom is only one of thirty-one (31) courts located in the City-County Building.

In addition to the guns and knives, the City-County Building is a regular target of bomb threats. General Manager Reinking testified that during his 19 years as a Building Authority employee, he recalls "a couple of bomb threats per year". With these types of concerns in mind the Building Authority has advocated, since at least 1988, "totally securing" the building by limiting public access to the building to certain entrances and by placing walk-through metal detectors and x-ray scanning devices at each such entrance.

After years of discussion, clear and definitive action was finally taken in June of 1995. Money was appropriated to place a metal detector and x-ray scanner in the open hallway connecting the west wing to the center tower lobby area (requiring anyone entering the west wing elevators to pass through such equipment) and cutting off the ability to cross over between the tower and the west wing above the first floor. The Board recognized that this plan would have several adverse effects upon congestion in the lobby area. The Board further recognized that this plan was likely the first of several steps towards totally securing the building.

D. The Building Authority's Understanding of the ICLU's Complaint and its Reasons for Adopting the October 1993 Policy.

Rabbi Grossbaum's menorah was placed in the lobby each year during Chanukah from 1985 to 1992. In December of 1992 the Building Authority received a complaint from the ICLU stating that the display of a menorah in the City-County Building lobby violated the Establishment Clause. The ICLU informed the Building Authority that it needed to designate the lobby as a public or open forum. In fact, the ICLU even submitted a proposed written policy to create such an open forum.

The Building Authority's concern at that time was not focused on the menorah or any other particular display, but instead was with the directive from the ICLU that the lobby be designated an open or public forum.

E. The Activity in the Lobby Following the Injunction of the 1993 Policy.

On November 29, 1994, the Seventh Circuit enjoined the Building Authority from enforcing the October 1993 policy during the then pending appeal. During this time period, several groups requested and were granted permission to place displays in the lobby. Other groups made inquiries but did not follow through on their requests. The requests were both religious and non-religious in nature. The activities in the lobby generated media coverage and the General Manager spent a significant amount of time responding to and monitoring the requests.

For example, the Building Authority received a request from the Freedom From Religion Foundation to erect a display to include the words "Jesus Christ Is A Myth: The Winter

Solstice Is The Reason for the Season". A request from a Mr. Stephen Schroeder asked permission to erect a display to read "Thou Shalt Have No Other Gods, Nor Display Their Images". Ms. Tracy Eads requested permission to display a pentagram, a five-pointed star celebrating the Wicca. Reverend Wayne T. Harris requested permission to display a cross. An unnamed person sent correspondence suggesting an intent to display a phallic symbol. These events did cause a certain degree of controversy.

F. The Three 1995 Policies at Issue and the Motive of the Board Members Generally.

On October 2, 1995 the Board of Directors unanimously amended and restated Rules 13 and 14 of the Rules and Regulations Governing the City-County Building. Similarly, on November 2, 1995 the Board of Directors unanimously amended Rule 9.

The portion of the minutes of the October 2, 1995 meeting of the Board of Directors reflecting the discussion by the Board members following a presentation by counsel and prior to the motion and adoption of current Rules 13 and 14, is as follows:

> The Directors reaffirmed that the Authority is responsible for assuring unobstructed and safe access by employees and the general public to the government offices and courts housed in the building. The Directors observed that over the past two years, new proposals for security measures for the City-County Building have been extensively reviewed and discussed including their impact on pedestrian traffic flow and ready-access by the public to the building. From time to time, the Authority has been

> asked by the City administration to find ways to improve the flow of traffic and the accessibility of government offices to the general public. The Directors agreed that the new security measures with the installation of metal detectors and x-ray scanners will slow the flow of traffic in the City-County Building and will to some degree increase the flow of traffic in the lobby of the Tower. The Directors also acknowledged that the under-elevatored condition of the building has placed a burden on moving people traffic in the lobby of the City-County Building. The Directors agree that private displays and structures may impede the flow of traffic and may create a public safety risk. This is especially true with respect to private displays and structures which are prone to controversy, disruption and hostility. The Directors concluded that for these reasons, the use of the common areas of the building should be restricted to the Authority and to City and County tenants. Upon motion duly made and seconded, the Board of Directors unanimously approved the following resolutions: . . . .

G. The Timing of the Seventh Circuit's Ruling and its Effect on the Building Authority's Actions Thereafter.

General Manager Reinking testified that he began discussions with counsel regarding a comprehensive set of policies that would address all displays by private groups in early 1993.

Mr. Reinking further testified that during the pendency of the first appeal relating to the 1993 policy, he and legal

counsel reached the conclusion that a recommendation would be made to the Board of Directors to ban all private displays "for reasons of access, traffic movement, and the upcoming security changes." Mr. Reinking further explained that he and legal counsel agreed to make this recommendation regardless of the outcome of the first appeal.

As for the precise timing, Mr. Reinking testified that legal counsel advised him to wait until after the Seventh Circuit ruled on the 1993 policy, to avoid the impression of "trying to make an end run." Again, the Seventh Circuit had enjoined the enforcement of the 1993 policy pending the appeal, and the Building Authority sought to avoid any action that might be construed as violating that order.

During this same time period the Board of Directors continued to reject any notion of a open forum. For example, the minutes from a Board meeting in December of 1993 reflect that the Board "agreed that no display or act should be permitted in the lobby of the City-County Building which would cause the lobby to be declared a 'public forum'". Similarly, on December 6, 1994, the Directors passed a resolution declaring and reaffirming their intention that "the lobbies, corridors and other common areas of the City-County Building are 'non-public forums'".

H. The Effect and Application of Amended Rules 9, 13 and 14.

The amended rules closed the forum to all private uses. By enacting a complete ban on all private displays in the lobby, the Building Authority closed the lobby as a forum. Further, "no one has even hinted that the rule has been or is being applied unequally." 100 F.3d at 1296. No private displays have been permitted since the forum was closed.

I. Correction of Misstatements of Fact and Law in the Petition.

Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of fact and law contained in the petition to the Court's attention.

While understandably posturing this case as turning on a question of law, the petitioners nonetheless mislead this Court as to the Seventh Circuit's factual conclusions. In the question presented, petitioners mislead this Court by implying that the Seventh Circuit concluded that the respondent "deliberately" sought to exclude the speech of religious groups based upon an illicit motive. (Petition at i). Similarly, petitioners mislead this Court by stating that the Seventh Circuit assumed *arguendo* that the respondents deliberately sought to suppress the speech of the petitioners and intended to retaliate against the petitioners. (Petition at 11). The Seventh Circuit never made such an assumption. First, the Seventh Circuit noted that the district court examined more than 900 pages of documentary evidence. 100 F.3d at 1299. These 900 pages consist of approximately 500 pages of deposition testimony from the five Board members, the General Manager, and the General Manager's Assistant and over 400 pages of stipulations of fact and documents describing *ad nauseam* the Building Authority's actions over the past decade. The district court concluded that "the evidence does not indicate that the defendants have ever had any hostility or religious-based animus against the plaintiffs". 909 F.Supp. at 1205. With regard to this conclusion, the Seventh Circuit expressly stated that the "District Court found a number of reasonable justifications for the new Rule 13 . . . and all are well within the bounds of what rational basis scrutiny permits." 100 F.3d at 1299. Finally, contrary to petitioners' assertion that the Seventh Circuit assumed that respondents had an illicit motive, the Seventh Circuit characterized petitioners' efforts at trying

to prove an illicit motive as nothing more than "fishing for an inculpatory admission". *Id.*

Apparently in an effort to lend credibility to the misstatement as to what the Seventh Circuit assumed about the motives of the Building Authority, the petitioners also misstate or are less than forthcoming in their statements of certain pertinent facts. For example, the petitioners state that both the ICLU and the JCRC demanded that the Building Authority prohibit religious displays in the lobby of the City-County Building. (Petition at 3). The JCRC did urge the Building Authority to develop a policy that would not permit religious displays. However, the ICLU, far from "demand[ing] that the Authority totally prohibit religious displays in the Building" (Petition at 3), urged the Building Authority to designate the lobby as a public forum. In fact the ICLU delivered a draft of an express policy creating such an open forum. Similarly, after listing the various private displays that were placed in the lobby in December of 1995, the petitioners note that a Christmas tree was displayed in the lobby. (Petition at 5). What they fail to tell this Court, however, is that the Christmas tree was owned and erected by the Building Authority and, therefore, was not a private display. Finally, petitioners state that in denying Rabbi Grossbaum's request to display his menorah, General Manager Reinking failed to tell Rabbi Grossbaum that Rule 13 had been amended on the preceding day. (Petition at 9). What petitioners fail to tell this Court is that Mr. Reinking enclosed a copy of the new Rule 13 in the October 3, 1995 letter to Rabbi Grossbaum advising of the denial.

Additionally, petitioners misstate the holding of the Seventh Circuit in several material respects. First, petitioners claim in two instances that the Seventh Circuit "acknowledged"

that its holding conflicts with this Court's decisions in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) and *Perry Educ. Ass'n. v. Perry Local Educators Ass'n.*, 460 U.S. 37 (1983). (Petition at 11, 12). As will be discussed more fully *infra*, the Seventh Circuit distinguished the *Cornelius* and *Perry* decisions. "Nonetheless, we view the present case as distinguishable from these prior precedents because the Court never considered a *content*-neutral speech restriction like Rule 13 [i.e. - a complete ban]. Rather, the Court's concern about motivation arose only in cases where the Court was considering speech restrictions that explicitly discriminated on the basis of content." 100 F.3d at 1298.

SUMMARY OF THE ARGUMENT

Respondents' argument is based on the fundamental difference between a policy that bans all private speech in a nonpublic forum, and a policy that merely restricts certain private speech (i.e. - allows some speakers but precludes others) in a nonpublic forum, albeit on a content-neutral basis.

Courts properly look to intent to determine whether a content-neutral policy restricting certain speech is in reality a facade for viewpoint discrimination. In order for a policy to be a facade for viewpoint discrimination, however, there must first be discrimination; which means some speakers or viewpoints must be disadvantaged relative to other speakers or viewpoints. When the government bans all private speech in a forum, there is and can be no discrimination because no speaker is disadvantaged relative to another speaker. Thus, intent is irrelevant when the government bans all private speech in a nonpublic forum.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

First, contrary to petitioners' assertion and as clarified *supra*, the Seventh Circuit did not acknowledge that its ruling was inconsistent with this Court's prior rulings. Rather, the Seventh Circuit correctly recognized the fundamental difference between: (1) a policy that bans all private speech; and (2) a policy that allows some private speakers, but prohibits others, on a content-neutral basis.

The fulcrum of the petition is *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985). In *Cornelius*, the Combined Federal Campaign ("Campaign") was a nonpublic forum. The Executive Order at issue allowed certain voluntary, tax-exempt, nonprofit charitable agencies to participate in the Campaign, but specifically excluded legal defense and political advocacy organizations. In other words, some private speakers were allowed to express themselves in the forum, while others were not. Although the basis for the restriction on access appeared reasonable, this Court expressly declined to decide whether the regulation was in reality a facade for an impermissibly motivated desire to suppress a particular point of view, and respondents were allowed to pursue this contention on remand. 473 U.S. at 812.

As the Seventh Circuit in this case explained, when some are allowed access to speak while others are excluded (even on an ostensibly content-neutral basis), it is appropriate for the Court to examine the intent of the government body to determine whether the policy is in reality a facade for viewpoint based discrimination. 100 F.3d at 1298. To state the

obvious, a facade for discrimination requires that there be discrimination; and discrimination necessarily requires that some speakers be disadvantaged (i.e. - denied access to the forum) relative to others (i.e. - allowed access to the forum). Thus, when some speakers are granted access while others are excluded, motive is relevant.

In this case, conversely, the Building Authority's policies ban all private displays. The forum has been closed. There is and can be no discrimination because no speaker is disadvantaged relative to another speaker. All speakers "receive the exact same treatment". 100 F.3d at 1298. Accordingly, there can be no facade and motive is irrelevant.

Petitioners either fail to recognize or choose to ignore this fundamental difference between banning all speech and restricting certain subjects on a content-neutral basis. Instead, petitioners distort and misconstrue the Seventh Circuit's use of the term "content-neutral". Whereas the Seventh Circuit used the term in the context of a complete ban on all private displays in a nonpublic forum, petitioners have attempted to apply reasoning from cases that use the term in the context of policies that restrict access to certain speakers or subjects and cases that are unrelated to fora analysis. Accordingly, none of the cases decided by this Court that are cited in the petition are on point. *See, Perry Educ. Ass'n v. Perry Local Educators Ass'n.*, 460 U.S. 37 (1983) (representative union allowed access to teachers' internal mail system, while rival unions were not).

The "flag burning" cases and *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445 (1994) cited by petitioners do not even involve fora analysis, let alone a complete ban on all private speech in a nonpublic forum. In each of these cases access to a forum was not an issue as the speaker had a general right to speak in the subject forum. The issue was whether the particular content or manner of speech was allowable. In the

present case, the issue relates to one's right of access to the forum in the first instance.

The issue in each of the "religion cases" cited by petitioners was whether the questioned governmental action violated the Establishment Clause because it lacked a secular purpose. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wallace v. Jaffree*, 472 U.S. 38 (1985); and *Edwards v. Aguillard*, 482 U.S. 578 (1987). The Seventh Circuit's opinion in this case, conversely, is expressly limited to whether motive is relevant when a ban on all private displays in a nonpublic forum is challenged on viewpoint and retaliation bases.

Finally, with little or no analysis petitioners lift a quote from *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). (Petition at 14). In the very next sentence following the language quoted by petitioners this Court states:

> The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.

466 U.S. at 804. This is precisely respondents' argument. As opposed to a policy that "regulate[s] speech", a complete ban does not "favor some viewpoints or ideas at the expense of others".

As the Seventh Circuit explained, the most pertinent guidance from this Court as to whether motive should be examined to determine whether viewpoint discrimination exists when all private displays are banned, comes from *Capitol Square Review and Advisory Board v. Pinette*, 115 S.Ct. 2440 (1995):

> Eight members of the Court joined behind the proposition that the State of Ohio 'could ban all unattended private displays in [the forum] if it so desired.' *Capitol Square*, ____ U.S. at ____, 115 S. Ct. at 2457 (Souter, J., concurring in part and concurring in the judgment); *see also id.* at ____, 115 S. Ct. at 2446; *id.* at ____ __ ____, 115 S. Ct. at 2467-68 (Stevens, J., dissenting) ['Today the Court correctly recognizes that a State may impose a ban on all private unattended displays in such a forum']. This proposed course of action would seem impossible, however, if Ohio's undisputed desire to keep the Klan off of government property would be sufficient to establish viewpoint discrimination. And if eight justices thought Ohio was free, even after it had discriminated against the Klan, to ban all private displays in a public forum, then the Building Authority *a fortiori* should have the same freedom to prohibit all private displays in its nonpublic forum.

100 F.3d at 1298-1299.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THE RULINGS OF OTHER CIRCUITS.

Again, petitioners either fail to appreciate or choose to ignore the difference between a complete ban and restricting access to some, while allowing others to speak. In *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), the school board generally allowed community members to participate in Youth Motivation Day and Career Day programs, but sought to

restrict or deny access to such forums to the Atlanta Peace Alliance. Similarly in *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995), the State was attempting to restrict the access of one group to a forum that was open to others. As explained *supra*, when one speaker is disadvantaged relative to other speakers, even pursuant to a content-neutral policy, there is a legitimate concern that the policy may be a facade for viewpoint discrimination and thus, motive is relevant. In the case of a complete ban, however, there is no such disparate treatment, and no need to inquire into motive. Finally, *Daniel v. Tampa*, 38 F.3d 546 (11th Cir. 1994), focused on the application of the policy, not its enactment. As the Seventh Circuit clearly explained, its holding that motive is irrelevant is limited to challenges to enactment (versus application) of a policy.

III.

THE DECISION BELOW IS LIMITED TO THE FACTS OF THIS CASE.

Contrary to petitioners' assertion, the opinion by the Seventh Circuit is not "novel", "revolutionary", does not have "very broad ramifications" and does not affect the exercise of constitutional rights "under the Fourth, Fifth, Sixth, Fourteenth and Fifteenth Amendments". (Petition, p. 11).

After generally addressing the relevance of motive in constitutional adjudication, the Seventh Circuit concluded:

> In short, the relevance of motive to constitutional adjudication varies by context. No automatic cause of action exists whenever allegations of unconstitutional intent can be made, but courts will investigate motive when precedent, text, and prudential considerations

> suggest it necessary in order to give full effect to the constitutional provision at issue.

100 F.3d at 1294.

After reviewing the specific facts and law applicable to this case, the Seventh Circuit held:

> Returning to the specifics of this case, Rule 13 is unequivocally a prospective and generally applicable rule because it bans all private displays henceforth. Furthermore, no one has even hinted that the rule has been or is being applied unequally. Lubavitch therefore has not stated facts sufficient for a retaliation claim. To hold otherwise would be a significant expansion of retaliation doctrine and would encourage only litigiousness and governmental paralysis.

100 F.3d at 1296.

With respect to petitioners' viewpoint claim, the Seventh Circuit held that the Building Authority's policy prohibiting "all private displays in its nonpublic forum" passed "constitutional muster regardless of motive". 100 F.3d at 1299. Finally, with respect to the reasonableness of Rule 13 the Seventh Circuit held that the "District Court found a number of reasonable justifications for the new Rule 13, 909 F.Supp. at 1205, 1207, 1209-10, and all are well within the bounds of what rational basis scrutiny permits". *Id.*

Thus, the Seventh Circuit's decision is limited to the specific facts, and the law as applied thereto, of this case.

CONCLUSION

For all the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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TJC:csw:SS-111689-1